NOS. 01-20-00477-CR, 01-20-00478-CR, 01-20-00479-CR

IN THE COURT OF APPEALS

FIRST JUDICIAL DISTRICT

AT HOUSTON, TEXAS

IN RE THE STATE OF TEXAS EX REL BRIAN W. WICE, RELATOR

ANCILLARY TO
THE STATE OF TEXAS V. WARREN KENNETH PAXTON, JR.
CAUSE NOS. 1555100, 1555101, 1555102
IN THE 185TH DISTRICT COURT OF HARRIS COUNTY, TEXAS

RELATOR'S MOTION FOR RECONSIDERATION EN BANC

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Do judges make law? Course they do. Made some myself.[1]

A divided panel denied the State's petition for mandamus relief, returning venue in these felony prosecutions involving the Texas Attorney General to Collin County. The majority concluded that because the order appointing Judge George Gallagher to preside over these cases expired in January 2017, his order granting the State's motion to change venue in April 2017 had to be vacated.[2] The majority opinion holds that:

- Paxton did not procedurally default this issue in July 2017 under the law of the case doctrine even though he consciously elected not to raise it in his May 2017 mandamus petition in the Dallas Court of appeals seeking Judge Gallagher's removal;[3]

- Paxton's objection in May 2017 that Judge Gallagher's venue order was voidable because his appointment order lapsed in January 2017 was timely even though there was no evidence to support Paxton's assertion that he only discovered "by happenstance" in May 2017 that Judge Gallagher's appointment had lapsed;[4] and

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[1] Chief Justice Jeremiah Smith, Supreme Court of New Hampshire (1802-1809), quoted in Paul Freund, "On Understanding the Supreme Court," 3, (Boston & Little 1949).

[2] *In re Brian W. Wice*, ___ S.W.3d ___, 2021 WL 2149332 (Tex.App.– Houston [1st Dist.] May 27, 2021)(orig. proceeding)(not yet reported). The majority's opinion is referred to as "Maj. Op." Although Justice Goodman's opinion is styled as a "Concurring and Dissenting Opinion," for ease, it will be referred to as "Dissent. Op."

[3] Maj. Op. at 10-12.

[4] *Id.* at 12-14.

- the plain language in Article V, section 11 of the Texas Constitution permitting district judges to exchange benches when expedient was trumped by the Court Administration Act.[5]

Justice Goodman concurred in the majority's holding that Judge Gallagher's order of appointment had expired[6] but dissented to its holding the Court Administration Act trumped Article V, section 11 of the Texas Constitution. Justice Goodman believed the constitution's grant of power to district judges to "exchange benches" when they believed it expedient allowed Judge Gallagher to sit even after his appointment order lapsed.[7]

The majority decision hands Paxton a win that should have occurred, if at all, over four years ago. Its ruling returning venue to Collin County turns a blind eye[8] to the legal and factual narrative driving the resolution of this case, and, so, should be reconsidered by the full Court. As Justice Goodman has opined, "If the circumstances presented by these cases are not extraordinary enough to merit reconsideration by the full court, then

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[5] *Id.* at 14-19.

[6] Diss. Op. at 4-7.

[7] *Id.* Unless otherwise noted, the State adopts the majority's opinion setting out the nature and procedural posture of this proceeding. Maj. Op. 3-8 ("Background").

[8] *Cf. Malbrough v. State*, 612 S.W.3d 537, 564 (Tex.App.– Houston [1st Dist.] 2020, pet. ref'd)(Countiss, J., concurring)("Justices continue to think and can change. ... I am ever hopeful that if the Court has a blind spot today, its eyes will be open tomorrow.")(citation omitted).

none are."[9]

SUMMARY OF THE ARGUMENT

1. The majority erroneously rewards Paxton for sandbagging the trial judge and the two regional administrative judges. Because Paxton did not raise Judge Gallagher's lapsed appointment in the mandamus he filed in the court of appeals seeking Judge Gallagher's removal, the law of the case doctrine precluded Paxton from litigating it subsequently.

2. Paxton either knew or could have easily learned of Judge Gallagher's lapsed appointment well before he granted the State's motion to change venue. Because Paxton's objection was untimely, and there was absolutely no evidence to support his assertion he learned by "happenstance" in May 2017 of this procedural irregularity, the majority erred in holding Paxton preserved this issue.

3. The majority erred in holding Article V, section 11, Texas Constitution permitting district judges to exchange benches when expedient is trumped by a mere statute whose only aim is to ensure that retired, former, and defeated jurists can continue to sit. As explained by Justice Goodman, the

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[9] *State v. Stephens*, 608 S.W.3d 245, 261 (Tex.App.– Houston [1st Dist.] 2020, pet. grt'd) (Goodman, J., *dissenting to the denial of en banc reconsideration*).

majority's failure to enforce canons of statutory construction reduces a longstanding and unambiguous constitutional mandate into a paper tiger with the jurisprudential vitality of a city ordinance.

GROUNDS FOR RECONSIDERATION EN BANC

1. The majority erroneously holds that the law of the case doctrine did not prelude Paxton from arguing whether the trial judge's appointment had lapsed when Paxton consciously decided not to raise this issue in the court of appeals in his original mandamus petition before venue was changed.

2. The majority erroneously holds that Paxton should be rewarded for sandbagging the trial judge and regional administrative judges as to whether the trial judge's appointment order had lapsed by not objecting to this procedural defect as soon as the basis for it was apparent or could have been discovered with reasonable diligence.

3. The majority erroneously holds that the plain text of Article V, section 11, of the Texas Constitution authorizing an exchange of benches between elected district judges when expedient is trumped by the Court Administration Act.

THE STANDARD FOR EN BANC REVIEW

En banc review of the majority's decision is warranted in this case to maintain uniformity of the Court's decisions regarding the standards governing procedural default and basic canons of statutory construction.[10]

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[10] *See* Tex. R. App. P. 41.2(c)("En banc consideration of a case is not favored and should not be ordered unless necessary to secure or maintain uniformity of the court's decisions or unless extraordinary circumstances require en banc consideration.").

"The standard [for en banc review] is sufficiently broad to afford the Court the discretion to consider a case en banc 'if the circumstances require and the court votes to do so.'"[11] As recounted below, en banc reconsideration of the majority's resolution of the critical issues this proceeding presents is warranted because its published opinion:

- has created an "undeniable conflict" on "an important issue" "likely to recur frequently,"[12]
- is "incompatible [with higher court precedent],"[13]
- is "of such magnitude that it should be corrected by this court sitting en banc or by our high court,"[14] and
- is "an error of law that is of such importance to the jurisprudence of the state that ... it requires correction ..."[15]

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[11] *Chakrabarty v. Ganguly*, 573 S.W.3d 413, 416 n. 4 (Tex.App.– Dallas 2019)(en banc); *In re Cook*, ___ S.W.3d ___, 2021 WL 1660645 at *6 (Tex.App.– Dallas April 28, 2021)(en banc)(not yet reported)(same).

[12] *See In re J.A.J.*, 225 S.W.3d 621, 632 (Tex.App.– Houston [14th Dist.] 2007), *aff'd in part, rev'd in part on other grounds*, 243 S.W.3d 611 (Tex. 2007)(Frost, J., *dissenting on denial of motion for en banc rehearing*)(en banc consideration "is appropriate and necessary in this case not only to resolve the undeniable conflict so that this court may speak with once voice on this important issue, but also because the issue is likely to recur frequently.").

[13] *Benge v. Williams*, 472 S.W.3d 684, 744 (Tex.App.– Houston [1st Dist.] 2014) *aff'd*, 548 S.W.3d 466 (Tex. 2018)(Lloyd, J., *dissenting to the denial of en banc reconsideration*).

[14] *Id.* (Jennings, J., *dissenting to the denial of en banc reconsideration*).

[15] *Interest of J.J.G.*, 540 S.W.3d 44, 63 (Tex.App.– Houston [1st Dist.], 2017, no pet.)(en banc)(Jennings, J., *dissenting*)(citation omitted).

ARGUMENT

1. THE LAW OF THE CASE PRECLUDES A SECOND BITE AT THE APPLE.

> It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who has argued and lost.[16]

In granting Paxton mandamus relief and removing Judge Gallagher as presiding judge in May 2017,[17] the Dallas Court of Appeals concluded:

- "[W]e agree with [Paxton] that [Judge Gallagher's] orders signed *after the transfer* [of venue] *order* are void..."[18]
- As a result of [Judge Gallagher's order transferring venue to Harris County on April 11, 2017] *jurisdiction over the cases vested in the Harris County district courts*, and the Collin County district court was divested of jurisdiction over the cases."[19]
- "We have already determined *that the signing of the transfer order vested jurisdiction in the Harris County District Courts* and divested the Collin County District Courts of jurisdiction over the cases."[20]
- "Jurisdiction over the cases vested immediately in the Harris

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[16] *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2nd Cir. 1981).

[17] *In re Paxton*, 2017 WL 2334242 (Tex.App.– Dallas May 30, 2017)(not designated for publication). Over the dissent of three judges, the Court of Criminal Appeals denied the State's motion for leave to file its original application for writ of mandamus. *In re State of Texas ex rel Wice*, 2017 WL 2472943 at *1 (Tex.Crim.App. June 7, 2017)(not designated for publication)(order).

[18] *In re Paxton*, 2017 WL 2334242 at *1. (emphasis added).

[19] *Id.* at *3. (emphasis added).

[20] *Id.* (emphasis added).

County district courts *when* [Judge Gallagher] *signed the transfer order.*[21]

- "[Judge Gallagher's] *authority to act expired when the venue order became final. Consequently*, [his] *appointment also expired at that time.*"[22]

These findings fortify the conclusion that Paxton's claim that Judge Gallagher lacked the authority to grant the State's motion for change of venue was without merit. Paxton consciously elected not to raise the issue of whether Judge Gallagher's appointment lapsed in his mandamus petition to remove him from presiding, two months before finally arguing this issue. The State argued below that the law of the case doctrine kept the Respondents from revisiting the question of where venue was proper.

The panel majority discussed what the law of the case doctrine was and the purposes this doctrine serves."[23] But it held the law of the case doctrine did not apply here "[b]ecause the Dallas Court of Appeals did not resolve whether Judge Gallagher had the authority to order a change of

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[21] *Id.* at * 4. (emphasis added).

[22] *Id.* at *5. (emphasis added).

[23] Maj. Op. 10-11. ("The doctrine is designed to promote judicial consistency and efficiency by eliminating the need for appellate courts to prepare opinions discussing previously resolved matters.")(citations omitted).

venue after the expiration of his appointment to the underlying cases."[24]

The majority's decision fails to address two critical considerations undermining the vitality of its ruling: (1) because a key purpose of the law of the case doctrine is to discourage piecemeal litigation, a party may not litigate in a later appeal involving the same parties any issue that could have been, but was not, raised in a prior appeal; and (2) the reason the court of appeals did not address the issue of whether Judge Gallagher's appointment expired is because Paxton consciously chose not to raise it in his May 2017 mandamus petition.

The "judicial consistency and efficiency" the majority acknowledges as a critical component of the law of the case doctrine means more than merely "eliminating the need for appellate courts to prepare opinions discussing previously resolved matters."[25] This "judicial consistency and efficiency" also bars the parties from litigating issues in a second appeal that could have been – but were not – presented in the first appeal:[26]

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[24] *Id.* at 11-12.

[25] *Id.*

[26] *See e.g., Macheca Transport Co. v. Philadelphia Indem. Ins. Co.*, 737 F.3d 1188, 1194 (8th Cir. 2013)(collecting cases).

- "An issue that could have been but was not raised on appeal is forfeited and may not be considered during a second appeal."[27]

- "The most rudimentary procedural efficiency demands that litigants present all available arguments to an appellate court on the first appeal."[28]

- "The law-of-the-case doctrine bars challenges to a decision made at a previous stage of the litigation which could have been challenged in a prior appeal, but were not. A party who could have sought review of an issue or ruling during a prior appeal is deemed to have waived the right to challenge that decision thereafter."[29]

Tellingly, the panel majority fails to mention the critical fact that Paxton could argued whether Judge Gallagher's appointment had expired when he sought mandamus relief from the court of appeals in May 2017 but consciously chose not to. Obviously, Paxton knew Judge Gallagher's appointment order had lapsed because Paxton attached copies of Judge Murphy's and Judge Evans's' appointment orders in the appendix to his mandamus petition filed on May 15, 2017.[30] The panel majority's holding that the law of the case doctrine did not apply because the court of appeals

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[27] *Lindquist v. City of Pasadena*, 669 F.3d 225, 239-40 (5th Cir. 2012).

[28] *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992).

[29] *United States v. Adesida*, 129 F.3d 846, 850 (6th Cir. 1997).

[30] RELATOR'S APPENDIX, Tab 1, pp. 2-3 (available on the Fifth Court of Appeals's website).

did not decide if Judge Gallagher had the authority to order a change of venue after his appointment lapsed is unsound. First, it failed to recognize Paxton consciously opted not to raise this issue in May 2017. Second, it failed to recognize that the law of the case doctrine precluded Paxton from seeking review of any issue he could have raised in the court of appeals.

The panel majority rewarded Paxton for holding back an argument he could have urged in the court of appeals[31] when this defect could have been cured and years of litigation avoided. The majority's opinion is "of such magnitude that it should be corrected by this court sitting en banc."[32]

2. PAXTON'S ALLEGEDLY "HAPPENSTANCE" DISCOVERY OF THIS CLAIM IN MAY 2017 WAS UNTIMELY AND UNSUPPORTED BY ANY EVIDENCE.

> No procedural principle is more familiar to this Court than that a constitutional right or a right of any sort may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it.[33]

The fundamental principle of procedural default has resulted in the

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[31] *Cf. Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d at 505 ("We should not permit such parties to hold in reserve an argument regarding a particular issue" as doing so "would be unfair to opposing parties, encourage piecemeal appeals, and undermine our procedural efficiencies.").

[32] *Benge v. Williams*, 472 S.W.3d at 738 (Jennings, J., *dissenting to the denial of en banc reconsideration*).

[33] *United States v. Olano*, 507 U.S. 725, 731 (1993).

execution of condemned men and women whose meritorious claims went unheard and overturning of multi-million-dollar judgments for deserving litigants. It is so essential to the administration of the criminal justice system that "it is a systemic requirement that must be reviewed by courts of appeals regardless of whether the issue is raised by the parties."[34]

On a prophylactic level, this postulate exists "so that the trial court can avoid the error or provide a timely and appropriate remedy, and the opposing party has an opportunity to respond, and, if necessary, react."[35] But this theorem also exists to keep a litigant from "sandbagging" the trial judge and opposing counsel in the interest of justice, equity, and fair play. This tactic is defined as, "The act or practice of a trial lawyer's remaining cagily silent when a possible error occurs at trial, with the hopes of preserving an issue for appeal if the court does not correct the problem."[36] Indeed, no artifice is more castigated and condemned by appellate courts:

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[34] *Ford v. State*, 305 S.W.3d 530, 532-33 (Tex.Crim.App. 2009).

[35] *Thomas v. State*, 408 S.W.3d 877, 884 (Tex.Crim.App. 2013).

[36] Black's Law Dictionary 1542 (Bryan A. Garner, ed., 10th ed. Thomson Reuters 2014). *See also Williams v. State*, ___ S.W.3d ___, 2021 WL 2132167 at *7 n. 47 (Tex.Crim.App. May 26, 2021)(not yet reported)(reversing court of appeals where defendant's failure to urge specific and timely objection "classically 'sand-bagged'" trial judge); *Mays v. State*, 318 S.W.3d 368, 383 (Tex.Crim.App. 2010)(contemporaneous objection rule "prevent[s] a party from "sandbagging" the trial judge).

- "This court will not tolerate 'sandbagging' defense counsel lying in wait to spring post-trial error."[37]

- Opining that "requiring the [timely] objection means the defendant cannot 'game' the system..."[38]

- Rules requiring timely trial objections guard against defendants who "choose to say nothing about a judge's plain lapse. ... [T]he value of finality requires defense counsel to be on his toes, not just the trial judge, and the defendant who just sits there when a mistake can be fixed just cannot sit there when he speaks up later."[39]

- "An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities."[40]

Yet the panel majority erroneously rewards Paxton for sand-bagging Judge Gallagher and the two regional administrative judges who intended for Judge Gallagher to preside over these cases by failing to timely object to him serving before he ordered venue changed. This record is altogether silent about how or when Paxton's counsel discovered Judge Gallagher's appointment had lapsed. Because the majority opinion turns the burden for preserving error on its head, reconsideration en banc is warranted.

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[37] *United States v. Sisto*, 534 F.2d 616, 624 n. 9 (5th Cir. 1976).

[38] *Puckett v. United States*, 556 U.S. 129, 134 (2009).

[39] *United States v. Vonn*, 535 U.S. 55, 73 (2002).

[40] *People v. Ford*, 168 N.E.2d 33, 40 (Ill. 1960).

Paxton claimed he learned that Judge Gallagher's appointment had lapsed "by happenstance after making a specific request seeking appointment documents to the regional administrative Judge..."[41] But the majority does not acknowledge that this record was silent as to when and by whom Paxton discovered Judge Gallagher's appointment had expired, an outcome-determinative fact emphasized by Justice Goodman.[42]

The majority compounds this error by "failing to address every issue raised and necessary to final disposition of this appeal"[43] – why Paxton's defense team consciously decided not to make the "specific request seeking appointment documents to the regional administrative Judge" in January, February, March, or April 2017 that it allegedly made in May 2017?[44] Had they done so, Judge Gallagher's appointment could have been extended

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[41] PAXTON'S APPENDIX, Tab 14 at p. 2.

[42] When the State argued there was no evidence to support Paxton's claim that he objected to the venue ruling as soon as he learned of the appointment order's expiration, Paxton offered to "take testimony on that [through] Phil [Hilder], who I think actually discovered this..." Because no such testimony was ever taken and Paxton's lawyer did not have personal knowledge of this matter, Justice Goodman correctly concluded that, "There is no evidence in the record as to how or when Paxton's counsel discovered that Gallagher's appointment had expired." Diss. Op. at 9 n.1

[43] Tex. R. App. P. 47.1. *See also King v. State*, 848 S.W.2d 142, 143 (Tex.Crim.App. 1993) (court of appeals must consider all relevant evidence in support of an appellant's point of error).

[44] *See Sims v. State*, 99 S.W.3d 600, 603-04 (Tex.Crim.App. 2003)(court of appeals should "show their work" by acknowledging a party's "number one argument and explain[ing] why it does not have the persuasive force that the party thinks it does.").

and years of litigation could have been avoided. But gauging from his zeal to remove Judge Gallagher from presiding, and filing a mandamus to ensure it happened, this was the last thing Paxton wanted. The panel majority overlooks the clear inference that Paxton's silence during this time was animated by his decision to roll the dice, believing that Judge Gallagher would deny the State's motion to change venue.[45] When this stratagem tanked, Paxton went to Plan B, positing, without any evidence that he learned "by happenstance" that Judge Gallagher's appointment had lapsed only after he ordered venue changed, and sandbagging a trio of jurists in the process.

The majority asserted that, "The State does not point out any specific event that should have triggered an inquiry into the terms of Judge Gallagher's assignment between January and May 2017" and that nothing in the record shows a lack of reasonable diligence [by Paxton] in

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[45] Because the very "information about the terms of Judge Gallagher's assignment" Paxton's lawyers allegedly came to learn of "by happenstance" in May 2017 "was not in the trial record," the majority reasons that "the absence of the assignment orders from the record, standing alone, would not have reasonably alerted Paxton he needed to find them." Maj. Op. at 13. This averment is a non-sequitur. The majority did not acknowledge this record is silent as to any allegedly serendipitous event that "reasonably alerted Paxton that he needed to find [these documents]" in May 2017 did not, in fact, actually transpire in January, February, March or April of that year and only after Judge Gallagher granted the State's motion to change venue, its decision absolving Paxton of sandbagging is clearly erroneous and brings this matter within the ambit of en banc reconsideration.

bringing the challenge."[46] But this analysis requires the State to engage in the useless act of proving a negative and improperly places the burden of showing that Paxton's objection was untimely on the State, instead of on Paxton to show it was timely.[47] The majority was required to review Respondent's ruling in light of what was before him when it was entered.[48] Paxton's failure to present any evidence as to when he first learned about the lapsed appointment makes two things clear: Paxton failed to carry his burden of showing his objection was timely; and, because there was no evidence supporting Respondent's ruling, it was an abuse of discretion.[49]

The majority's decision rewards Paxton for two separate instances of sandbagging: not objecting to Judge Gallagher's lapsed appointment when this request could have been made well before venue was changed; and not seeking to vacate Judge Gallagher's venue ruling in May.[50] By

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[46] Maj. Op. at 13-14. That Paxton "by happenstance" was ultimately able to discover that Judge Gallagher's appointment lapsed by simply requesting a copy of the latter's appointment order from Judge Murphy forecloses the majority's reasoning in this regard.

[47] *See* Tex. R. App. P. 33.1(a)(1). *See also Saenz v. State*, 474 S.W.3d 47, 52 n. 3 (Tex.App. – Houston [14th Dist.] 2015, no pet.)(the law does not require a party to perform a useless act).

[48] *Willover v. State*, 70 S.W.3d 841, 845 (Tex.Crim.App. 2002).

[49] *See In re State*, 605 S.W.3d 721, 724 (Tex.App.– Houston [1st Dist.] 2020, orig. proc.).

[50] *See Fisher v. State*, 357 S.W.3d 115, 117 (Tex.App.– Amarillo 2011, pet.ref'd)(defendant forfeited his claim under the Interstate Agreement on Detainers Act by not raising it until his second

sanctioning Paxton's failure to exercise the reasonable diligence subsumed in the timeliness mandate of error preservation, this ruling will spawn a series of sequels where bedrock tenets of procedural default will, as here, be sacrificed on the alter of a sandbagging defendant's wilful blindness.[51] Giving Paxton a pass on preservation portends "grave consequences for Texas law."[52] Reconsideration en banc in this proceeding is warranted.

3. THE CONSTITUTIONAL EDICT PERMITTING EXCHANGE OF BENCHES WHEN EXPEDIENT TRUMPS THE COURT ADMINISTRATION ACT.

> When interpreting our state constitution, we rely heavily on its literal texts, and are to give effect to its plain language. ... Those of us who are called on to construe the Constitution should not thwart the will of the people by construing it differently from its plain meaning.[53]

The State argued below that even if Judge Gallagher's statutory

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trial even though 120 days expired before the first proceedings began).

[51] The majority's attempt to distinguish *State v. Wachtendorf*, 475 S.W.3d 895, 903 (Tex.Crim.App. 2015), Maj. Op. at 12-13, is unavailing. The majority acknowledges that the State's failure to exercise diligence in *Wachtendorff* in monitoring the district clerk's record to see when the trial judge signed the motion to suppress procedurally defaulted this complaint. But the only reason it offers why Paxton's lack of diligence, driven by his willful blindness, is any different from that condemned in *Wachtendorf* is that "the terms of Judge Gallagher's assignment order was not in the trial court's record." Maj. Op. at 13. This is a distinction wholly without a difference.

[52] *Benge v. Williams*, 472 S.W.3d at 739 (Keyes, J., *dissenting to the denial of en banc reconsideration*).

[53] *Smith v. State*, 01-19-00442-CR, 2020 WL 6731656 at *5-6 (Tex.App.– Houston [1st Dist.] Nov. 17, 2020, pet. ref'd)(not designated for publication)(Hightower, J.).

appointment had expired, under Article V, section 11 of the Texas Constitution, which allows district judges to "exchange benches," Judge Gallagher was still authorized to act. The majority rejected this argument because it believed that applying the plain text of the constitution would "create confusion about the scope of [statutory] assignment orders and undermine the effectiveness of the Court Administration Act."[54] En banc review should be granted because, as Justice Goodman's dissent notes, the majority's holding erroneously elevates a statute over the constitution.

First, as Justice Goodman correctly holds in rejecting the majority's avowal that Article V, section 11 does not control because Judge Gallagher was statutorily assigned and had not exchanged benches:

- Article V, section 11's use of "expediency" permitting the exchange of district benches is "very broad" and means "convenient and practical"[55] and because Judge Murphy and Judge Evans deemed it expedient for Judge Gallagher to preside over these cases, this constitutional provision authorized Judge Gallagher to sit even after his appointment order lapsed.[56]

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[54] Maj. Op. at 19.

[55] Justice Goodman's reasoning and analysis is fortified by the tenet that "courts should not give an undefined statutory term a meaning out of harmony or inconsistent with other provisions, although it might be susceptible of such a construction if standing alone." *TxDOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002)(citing Tex. Govt. Code section 311.011(b)).

[56] Diss. Op. at 8-9. The majority does not discuss *Permian Corp. v. Pickett*, 620 S.W.2d 878, 880-81 (Tex.App.– El Paso 1981, writ ref'd n.r.e.), relied on by Justice Goodman. Contrary

- the framers "necessarily weighed the trade-off between certainty and flexibility and struck the balance in favor of the latter by placing no limitations other than expediency on the provision."[57]

- *Roberts v. Ernst,*[58] relied upon by the majority to support its holding that Judge Gallagher's assignment could not seen as a constitutional exchange of benches, is clearly distinguishable because its facts were not merely "very different" but "remarkable."[59]

Second, as Justice Goodman correctly reasons, the majority's belief that "automatically convert[ing]" Judge Gallagher's expired statutory assignment into a constitutional exchange of benches when expedient "would create confusion about the scope of assignment orders and undermine the effectiveness of the Court Administration Act" is wrong:

- "Our Constitution is supreme. If its provisions undermine a statute, it is the statute that must give way. Courts have repeatedly said so with respect to Article V, Section 11 in particular."[60]

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to the majority's decision, *Permian* holds that an assignment order showing the judges involved had deemed it expedient for the assigned judge to preside over a case as authorized by Article V, section 11 even though the order referenced neither the constitutional provision nor its expediency standard.

[57] Diss. Op. at 9. The facts in *Roberts* reveal that Justice Goodman's description of them as "remarkable" and "very different" is understated. In reality, they are by turns unique and bizarre.

[58] 668 S.W.2d 843, 844-45 (Tex.App. – Houston [1st Dist.] 1984, orig. proc.).

[59] Diss. Op. at 10-11. ("*Roberts* stands for the commonsense proposition that an exchange of benches cannot exist or be implied from an expired assignment, when the facts definitely show that one judge is interfering with the rightful authority of another. This principle has no applicability here, given that Gallagher was the lone judge presiding over these cases when they were transferred to Harris County.").

[60] Diss. Op. at 12.

- "But given that neither the presiding administrative judges nor the district judge who ordinarily presides over the Collin County court objected to Judge Gallagher continuing to hear these cases, any ostensible conflict with the Court Administration Act is chimerical."[61]

Justice Goodman's reasoning and analysis is fortified by the holdings of the cases upon which he relies that are unmentioned by the majority:

- "Thus, it will be seen that the authority of the district judges to hold courts for each other when they deem it expedient is conferred by the Constitution, and it cannot be supposed that the Legislature, in enacting [this statute], intended to contravene that provision of the Constitution."[62]

- "[T]he right of district judges to exchange districts and hold court for each other is provided for by section 11 of article 5 of our State Constitution, and cannot be taken away by statute."[63]

- "There is no room for construction here, the literal terms [of Article V, section 11] must be followed."[64]

The majority's decision conflicts with the canon of construction that when the Legislature enacts a statute, it is presumed that compliance with the constitutions of this state and the United States is intended.[65]

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[61] *Id.*

[62] *Connellee v. Blanton*, 163 S.W. 404, 406 (Tex.App.– Fort Worth 1913, writ ref'd).

[63] *Moore v. Davis*, 32 S.W.2d 181, 182 (Tex. Comm'n. App. 1930).

[64] *Reynolds v. City of Alice*, 150 S.W.2d 455, 460 (Tex.App.– El Paso 1940, no writ).

[65] Tex. Govt. Code, section 311.021(1)(canons of construction in Code Construction Act).

This Court has reaffirmed the fundamental tenet, through a member of the majority, that in construing a provision of the Texas Constitution, "[W]e are principally guided by the language of the provision itself as the best indicator of the framers who drafted it and the citizenry who adopted it."[66] By honoring this principle in the breach and not the observance, this consequential blind spot[67] in the majority's ruling requires en banc review.

CONCLUSION

Like Banquo's ghost in Macbeth, the panel majority's decision will haunt Texas jurisprudence whenever an opportunistic defendant attempts to sandbag a trial judge or the criminal justice system itself, or argues a deeply-rooted constitutional edict must yield to an otherwise insignificant statute. At the end of the day, the majority's decision "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[68] While en banc reconsideration is ordinally not favored, this Court should "deem it appropriate here."[69]

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[66] *Smith v. State*, 2020 WL 6731656 at *5 (Hightower, J.).

[67] *Cf. Malbrough v. State,* 612 S.W.3d at 564 (Countiss, J., *concurring*).

[68] *Korematsu v. United States*, 323 U.S. 214, 246 (1944)(Jackson, J., *dissenting*).

[69] *In re Cook*, ___ S.W.3d ___, 2021 WL 1660645 at *6.

PRAYER FOR RELIEF

Relator asks this Court to grant reconsideration en banc and vacate the panel majority's decision, and issue a writ of mandamus commanding Respondent to discharge his ministerial duties to:

- vacate his October 23, 2020 order returning venue to Collin County;
- "issue a new order for payment of fees in accordance with a fee schedule that complies with Article 26.05(c) of the Texas Code of Criminal Procedure"[70] to the Attorneys Pro Tem; and
- grant Nicole DeBorde's unopposed motion to withdraw as Attorney Pro Tem.[71]

RESPECTFULLY SUBMITTED,

/s/ **Brian W. Wice**

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[70] *Wice v. Fifth Court of Appeals*, 581 S.W.3d 189, 200 (Tex.Crim.App. 2018).

[71] Maj. Op. at 20 ("Because of our disposition of the State's first issue, we do not reach its second and third issues that we compel the trial court to rule on certain motions. *See* TEX. R. APP. P. 47.1").

CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. 9.5(d), this motion was served on opposing counsel by electronic filing on June 8, 2021.

/s/ Brian W. Wice

BRIAN W.WICE

CERTIFICATE OF COMPLIANCE

This document complies with the limitations of Rule 9.4(i)(2)(D), and exclusive of the portions in Rule 9.4(i)(1), it contains 4,447 words.

/s/ Brian W. Wice

BRIAN W.WICE

APPENDIX

In re State of Texas ex rel. Brian W. Wice,
___ S.W.3d ___, 2021 WL 2149332
(Tex.App.– Houston [1st Dist.] May 27, 2021)
(not yet reported)

2021 WL 2149332
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Houston (1st Dist.).

IN RE the STATE of Texas EX
REL. Brian W. WICE, Relator

NO. 01-20-00477-CR, NO. 01-20-00478-CR, NO. 01-20-00479-CR

Opinion issued May 27, 2021

Original Proceeding on Petition for Writ of Mandamus

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Panel consists of Justices Goodman, Hightower, and Countiss.

OPINION

Julie Countiss, Justice

***1** Relator, Brian W. Wice, on behalf of The State of Texas (the "State"), filed a petition for writ of mandamus, requesting that this Court vacate a June 25, 2020 order signed by the Honorable Robert Johnson of the 177th District Court of Harris County, Texas that vacated a previous change of venue order and returned the underlying cases to Collin County, Texas. [1] Relator also requests that this Court compel the trial court to rule on certain motions.

While the mandamus petition was pending in this Court, Judge Johnson recused himself from the underlying cases and they were reassigned to Respondent, the Honorable Jason Luong of the 185th District Court of Harris County. We abated the proceedings to allow Respondent to reconsider the challenged June 25, 2020 order and, if necessary, to rule on other pending motions. [2] Respondent then entered an October 23, 2020 order finding that the trial court lacked jurisdiction to reconsider Judge Johnson's order and alternatively, even if the trial court had jurisdiction, Judge Johnson was correct in vacating the change of venue order and returning the underlying cases to Collin County. We reinstated the original proceedings on the Court's active docket, and the State supplemented its mandamus petition to challenge Respondent's October 23, 2020 order.

In three issues, the State contends that Respondent erred in vacating the previous change of venue order, returning the underlying cases to Collin County, and not ruling on certain motions.

We deny the petition.

Background

Wice serves as Collin County District Attorney *Pro Tem* prosecuting three underlying felony criminal cases brought against Real Party in Interest, Warren Kenneth Paxton, Jr. ("Paxton"), in Collin County on July 28, 2015. The cases were originally assigned to the Honorable Chris Oldner of the 416th District Court of Collin County. [3] Judge Oldner promptly recused himself and the next day, the cases were assigned by the Presiding Judge of the First Administrative Judicial Region (the "First Region") to the Honorable George Gallagher of the 396th District Court of Tarrant County, Texas.

Judge Gallagher, whose elected bench is in the Eighth Administrative Judicial Region (the "Eighth Region"), [4] was assigned to the First Region by the Eighth Region's Presiding Judge at the request of the First Region's Presiding Judge. The order of the Eighth Region's Presiding Judge assigned Judge Gallagher to the First Region "for a period of 157 days, beginning July 28th, 2015." It also provided that "[i]f the judge beg[an] a trial on the merits during the period of th[e] assignment, the assignment continue[d] in such case until plenary jurisdiction ha[d] expired" or the Eighth Region's Presiding Judge "ha[d] terminated th[e] assignment in writing, whichever occur[red] first."

***2** A second assignment order from the Eighth Region's Presiding Judge, signed on December 21, 2015, extended Judge Gallagher's assignment to the First Region for a "period of 366 days, beginning January 1, 2016." The order also provided that "[i]f the judge beg[an] a trial on the merits during the period of th[e] assignment the assignment continue[d] in such case until plenary jurisdiction ha[d] expired" or the Eighth Region's Presiding Judge "ha[d] terminated th[e] assignment in writing, whichever occur[red] first." And the First Region's Presiding Judge signed an order extending Judge Gallagher's assignment to the underlying cases "from October 23, 2015 until such time as necessary to complete any actions required by Judge Gallagher as the presiding judge in the above matter, unless the assignment [was] earlier terminated by the Presiding Judge of the [First Region]."

Judge Gallagher did not begin a trial on the merits within the 366 days of the assignment by the Eighth Region's Presiding Judge, so that assignment, by its terms, expired on January 2, 2017.[5] The same day, the Honorable Andrea Thompson succeeded Judge Oldner and began presiding over the 416th District Court of Collin County.

Judge Gallagher nevertheless continued to preside over the underlying cases. On February 9, 2017, the State moved to change venue from Collin County to Harris County. On March 30, 2017, Judge Gallagher granted the State's motion to change venue, and on April 11, 2017, he issued a supplemental order changing venue to Harris County.

On May 10, 2017, Paxton objected to Judge Gallagher's venue rulings, asserting that they were void because his assignment by the Eighth Region's Presiding Judge had expired before they were made. In response, Relator asserted that Paxton's objection was a motion for relief and, because of the venue ruling, asked that it be heard in Harris County. Judge Gallagher did not rule on the objection, and, on May 12, 2017, he ordered that the objection be heard in Harris County.

Before a hearing could go forward in Harris County, a series of mandamus petitions were filed in the Dallas Court of Appeals and the Court of Criminal Appeals. Among those petitions was a May 15, 2017 petition for writ of mandamus filed by Paxton in the Dallas Court of Appeals, which complained that Judge Gallagher continued to act in the underlying cases after they had been transferred to Harris County. *See In re Paxton*, Nos. 05-17-00508-CV, 05-17-00509-CV, —— S.W.3d ——, 2017 WL 2334242 (Tex. App.—Dallas May 30, 2017, orig. proceeding).

On June 9, 2017, the Collin County District Clerk transferred the case files to Harris County. On June 13, 2017, the underlying cases were randomly assigned to the 177th District Court of Harris County, Judge Johnson presiding. On July 18, 2019, Paxton filed a motion with that court asking it to vacate Judge Gallagher's change of venue order as void and return the cases to Collin County. Judge Johnson signed an order granting Paxton's motion on June 25, 2020.

On June 30, 2020, Relator filed its mandamus petition in this Court, related to each of the underlying cases, requesting that we vacate Judge Johnson's June 25, 2020 order and compel Judge Johnson to rule on certain pending motions.[6] Relator moved to stay enforcement of the June 25, 2020 order pending resolution of the mandamus proceedings. We granted Relator's motion to stay on July 7, 2020.

***3** Relator then informed this Court that Judge Johnson had voluntarily recused himself from the underlying cases on July 6, 2020 and the cases had been reassigned on July 15, 2020 to the 185th District Court of Harris County, Judge Luong presiding. On July 28, 2020, we abated the original proceedings to allow Respondent to reconsider the challenged June 25, 2020 order and, if appropriate, to consider the pending motions about which Relator complains.[7] On October 23, 2020, in an "Order of Reconsideration of Prior Order Vacating Order of Transfer to Harris County," Respondent found:

> [The trial court's] plenary jurisdiction to review the June 25, 2020 [order] ha[d] expired.
>
> The June 25, 2020 order effectively transferred the case back to Collin County, Texas, and jurisdiction immediately and automatically vest[ed] in the transferee court—that is, the 416th District Court of Collin County, Texas. The [First Court of Appeals's] order of abatement and request for reconsideration was issued on July 28, 2020.
>
> Accordingly, th[e] [trial] [c]ourt [was] without jurisdiction to review the challenged order or any pending motions in the[ ] cases.

Alternatively, Respondent held:

> [I]f it is determined by the First Court of Appeals, or by any other or higher appellate court that the 185th Judicial District Court d[id] have jurisdiction to review and reconsider the June 25, 2020 [o]rder, it [was] the [trial] [c]ourt's finding that Judge Gallagher was without jurisdiction to enter the March 30, 2017 [change of venue] order, that the March 30, 2017 order and related venue orders should be set aside, and that the Harris County District Clerk's file should be transferred to the Collin County District Clerk.

Relator apprised this Court of Respondent's October 23, 2020 order, moved to stay its enforcement, and supplemented its mandamus petition. Paxton reasserted his response to the original mandamus petition.

On October 29, 2020, we lifted the abatement and reinstated the original proceedings on the Court's active docket. We also granted Relator's motion to stay enforcement of Respondent's October 23, 2020 order and clarified that our previous stay of Judge Johnson's June 25, 2020 order remained in effect.

Standard of Review

Mandamus relief is available in a criminal case when (1) the relator has shown that no other adequate remedy at law is available and (2) the act the relator seeks to compel is ministerial, not discretionary. *Braxton v. Dunn*, 803 S.W.2d 318, 320 (Tex. Crim. App. 1991); *Dickens v. Ct. of App. for Second Supreme Judicial Dist. of Tex.*, 727 S.W.2d 542, 548–49, 552 (Tex. Crim. App. 1987) (applying standard to pretrial matter). An act is ministerial "where the law clearly spells out the duty to be performed ... with such certainty that nothing is left to the exercise of discretion or judgment." *Tex. Dep't of Corrections v. Dalehite*, 623 S.W.2d 420, 424 (Tex. Crim. App. 1981). "[T]he relator must have a clear right to the relief sought, meaning that the merits of the relief sought are beyond dispute." *In re McCann*, 422 S.W.3d 701, 704 (Tex. Crim. App. 2013) (internal quotations omitted). "[A]lthough an issue may be one of first impression, it does not necessarily follow that the law is not well-settled"; an appellate court may grant mandamus relief "based on a well-settled, but rarely litigated point of law." *Id.*

A writ addressing pretrial matters in criminal cases may issue to correct a "clear abuse of discretion" by the trial court. *See Dickens*, 727 S.W.2d at 549–50. The trial court abuses its discretion if its ruling is "arbitrary and unreasonable, made without regard for guiding legal principles or supporting evidence." *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016). A trial court also abuses its discretion if it "fails to analyze or apply the law correctly." *Id.*

***4** Mandamus is available when a trial court enters an order without authority. *In re State ex rel. Sistrunk*, 142 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2004, orig. proceeding). A trial court has a ministerial duty to vacate a void order. *In re Paxton,* —— S.W.3d at ——, 2017 WL 2334242, at *5. A trial court's order is void if the record shows the trial court had no jurisdiction over the parties, no subject-matter jurisdiction, no jurisdiction to enter the order, or no capacity to act as a court. *See id.* at ——, 2017 WL 2334242 at *3.

Validity of Change of Venue Order

In its first issue, the State argues that Respondent erred in ordering that Judge Gallagher's change of venue order be set aside and that the underlying cases be returned to Collin County based on the expiration of the appointment order because (1) Paxton is foreclosed from challenging the validity of the change of venue order because the Dallas Court of Appeals already decided that issue in a prior mandamus proceeding; (2) Paxton failed to timely preserve his objection to the change of venue order's validity; (3) the appointment orders gave Judge Gallagher the authority to order the change of venue; and (4) Judge Gallagher could continue to preside over the underlying cases pursuant to an exchange of benches under Texas Constitution Article V, section 11. [8]

A. Law of the Case

The State argues that Respondent erred in vacating Judge Gallagher's change of venue order because the law of the case doctrine forecloses Respondent's conclusion that the trial court lacked jurisdiction to review Judge Gallagher's change of venue order or any pending motions in the underlying

cases. According to the State's reading of the Dallas Court of Appeals' decision in *In re Paxton*, the Dallas Court of Appeals already determined that Judge Gallagher's authority to act terminated only after he granted the State's motion to transfer venue from Collin County to Harris County.

"The law of the case doctrine provides that an appellate court's resolution of questions of law in a previous appeal are binding in subsequent appeals concerning the same issue." *State v. Swearingen*, 424 S.W.3d 32, 36 (Tex. Crim. App. 2014) (internal quotations omitted). "In other words, when the facts and legal issues are virtually identical, they should be controlled by an appellate court's previous resolution." *Id.* The doctrine is designed to promote judicial consistency and efficiency by eliminating the need for appellate courts to prepare opinions discussing previously resolved matters. *Howlett v. State*, 994 S.W.2d 663, 666 (Tex. Crim. App. 1999); *see also* *Swearingen*, 424 S.W.3d at 36.

We do not agree with the State's understanding of the scope of the Dallas Court of Appeals's decision in *In re Paxton.* In that mandamus proceeding, Paxton challenged Judge Gallagher's authority to continue to preside over the underlying cases without Paxton's consent "because a judge that orders a change in venue in a criminal case may continue to preside over the case after the transfer and continue to use the transferor court's administrative resources only if the State, the defendant, and the defendant's counsel consent." *In re Paxton,* —— S.W.3d at ——, 2017 WL 2334242, at *2. The Dallas Court of Appeals thus addressed whether Judge Gallagher had the authority to enter orders *after* issuing the change of venue order; it did not consider whether Judge Gallagher had the authority to order the change of venue to Harris County. *See id.* at ——, ——, 2017 WL 2334242 at *2, *3. Because the Dallas Court of Appeals did not resolve whether Judge Gallagher had the authority to order a change of venue after the expiration of his assignment to the underlying cases, the law of the case doctrine does not prevent us from resolving that issue here.

B. Failure to Preserve Objection

***5** The State also argues that Respondent erred in vacating Judge Gallagher's change of venue order because Paxton forfeited any argument that Judge Gallagher lacked authority to keep acting after the expiration of his appointment by failing to raise a timely objection on that ground as soon as the basis for it became apparent "or was subject to discovery with ... reasonable diligence during the first week of January 2017." *See* *Marin v. State*, 851 S.W.2d 275, 279–80 (Tex. Crim. App. 1993) (discussing rights subject to forfeiture by "failure to insist upon [them] by objection, request, motion, or some other behavior calculated to exercise the right[s] in a manner comprehensible" to trial court).

Paxton first raised the issue of the terms of Judge Gallagher's appointment with the First Region's Presiding Judge in May 2017, a month after filing his mandamus petition in the Dallas Court of Appeals, In July 2019, Paxton moved the trial court to set aside Judge Gallagher's change of venue order on that ground. The State cites *State v. Wachtendorf*, for the proposition that by exercising diligence, Paxton could have discovered the terms of Judge Gallagher's appointment earlier. 475 S.W.3d 895 (Tex. Crim. App. 2015). But *Wachtendorf* concerned whether the State had constructive notice that the trial court had signed an order. *See id.* at 903. The Court of Criminal Appeals rejected the State's attempt to appeal an order suppressing evidence as untimely because the State "could have exercised diligence to monitor the district clerk's record." *Id.*

The facts here are different from those in *Wachtendorf.* The mandamus record shows that information about the terms of Judge Gallagher's assignment was not in the trial court's record. And the absence of the assignment orders from the record, standing alone, would not have reasonably alerted Paxton that he needed to find them. Like notice of exchange of benches,[9] "[n]otice of assignment is clearly optional and not mandatory." *Turk v. First Nat'l Bank of W. Univ. Place*, 802 S.W.2d 264, 265 (Tex. App.—Houston [1st Dist.] 1990, writ denied). The State does not point out any specific event that should have triggered an inquiry into the terms of Judge Gallagher's assignment between January and May 2017. And, from May 2017 until July 2019, when he moved to set aside the change of venue order, Paxton did not seek any affirmative relief from the Harris County district court.

The Court of Criminal Appeals has concluded that a defendant's right to challenge the authority of a trial judge, who is otherwise qualified,[10] to preside pursuant to an expired assignment, is in the category of rights subject to forfeiture under *Marin. See* *Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998); *see also* *Marin*, 851 S.W.2d at 279–80. But it held that a defendant may preserve that issue if the objection is raised pretrial. *See* *id.* Here,

Paxton challenged Judge Gallagher's authority to preside pursuant to an expired assignment before trial, and nothing in the record shows a lack of reasonable diligence in bringing the challenge. We therefore hold that it was not an abuse of discretion for the trial court to conclude that Paxton did not forfeit his challenge to Judge Gallagher's authority to order the change of venue.

C. Authority Under the Assignment Orders

*6 The State argues that Respondent erred in vacating Judge Gallagher's change of venue order because the appointment orders gave Judge Gallagher the authority to order the change of venue to Harris County.

In response to the First Region Presiding Judge's request for the assignment, the order of the Eighth Region's Presiding Judge extended Judge Gallagher's assignment to the 416th District Court of Collin County for a "period of 366 days, beginning January 1, 2016." But the State asserts that Judge Gallagher still had the authority to continue to preside over the underlying cases when he signed the change of venue order on March 30, 2017 because the terms of the assignment order signed by the First Region's Presiding Judge, assigned Judge Gallagher to the underlying cases "until such time as necessary to complete any actions required by Judge Gallagher as the presiding judge in the above matter, unless the assignment is earlier terminated...."

A judge sitting by order of assignment "has all the powers of the judge of the court to which he is assigned." TEX. GOV'T CODE ANN. § 74.059(a). Generally, visiting judges are assigned either to a particular case or for a period of time. *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 41 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Typical assignment orders provide that the visiting judge's authority terminates on a date specified in the assignment order or on the occurrence of a specific event, such as the signing of a judgment or ruling on a motion for new trial. *Hull*, 365 S.W.3d at 41. The terms of the assignment order control the scope of the visiting judge's authority and when that authority terminates. *Id.*; *In re Richardson*, 252 S.W.3d 822, 828 (Tex. App.—Texarkana 2008, no pet.); *Mangone v. State*, 156 S.W.3d 137, 139–40 (Tex. App.—Fort Worth 2005, pet. ref'd).

We understand the assignment order of the Presiding Judge for the Eighth Region as defining the outer limit of Judge Gallagher's assignment. Judge Gallagher was assigned to the underlying cases pursuant to the Texas Government Code section 74.056(b), which permits "[t]he presiding judge of one administrative region" to ask "the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." TEX. GOV'T CODE ANN. § 74.056(b). Judge Gallagher's authority to act in the underlying cases derived from the orders of the Presiding Judges for the Eighth and First Regions, respectively, assigning Judge Gallagher to preside over them.

Section 74.056(b) provides that "[t]he presiding judge of one administrative region may request the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." *See id.* The request of the First Region's Presiding Judge led the Eighth Region's Presiding Judge to assign Judge Gallagher according to certain terms, and the Presiding Judge for the First Region's acceptance of Judge Gallagher's assignment was necessarily pursuant to those terms. Interpreting section 74.056(b) as allowing the receiving judicial administrative presiding judge to unilaterally dictate the terms of an assignment would thwart regional oversight and conflict with the purpose of regional administrative management. [11]

*7 We also reject the State's proposed interpretation of the two assignment orders because it places the orders in direct conflict with each other and renders the specific term of the assignment set forth in the Eighth Region Presiding Judge's order meaningless, contrary to well-settled rules of construction. Under those rules, specific provisions control over general provisions, provisions stated earlier in an agreement are favored over later provisions, and the interpretation should not render any material terms meaningless. *See State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995). Applying these rules to the two assignment orders, we conclude that they can be reasonably read to agree that Judge Gallagher's assignment to the 416th District Court of Collin County was to end on January 2, 2017. *See* TEX. R. CIV. P. 4; TEX. R. APP. P. 4.1.

D. Authority Through the Exchange of Benches

The State also argues that Respondent erred in vacating Judge Gallagher's change of venue order because the change of venue order was valid. The State asserts that after his appointment to the underlying cases in the 416th District Court of Collin County expired, Judge Gallagher was authorized to sit without an appointment order.

According to the State, the Texas Constitution provides that "the District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law." TEX. CONST. art. V, § 11. [12] "The expression 'whenever they deem it expedient' ... confers on district judges broad discretionary powers to exchange benches, or hold court for each other, which is reviewable only if an abuse of discretion has occurred." *Floyd v. State*, 488 S.W.2d 830, 832 (Tex. Crim. App. 1972). And "[a]lthough better practice would require one, the exchange may be accomplished without the necessity of a formal order or entry on the record of the reasons for such exchange." *Id.*

"[W]here no objection is made to the right of a judge from another district to sit in a case, all objections to his authority to sit are considered waived and it is presumed the judge was in regular discharge of his duties pursuant to the statute authorizing an exchange of benches." *Id.* Here, though, Paxton challenged Judge Gallagher's authority to continue to sit in the underlying cases and proved through administrative records that his appointment had expired before Judge Gallagher ruled on the State's motion to change venue. Because Paxton objected to Judge Gallagher's authority, any presumption that Judge Gallagher "was in regular discharge of his duties" does not apply. We also decline to entertain a presumption that Judge Gallagher's appointment was automatically converted to an exchange of benches on these facts because such precedent would create confusion about the scope of assignment orders and undermine the effectiveness of the Court Administration Act. *See, e.g.*, TEX. GOV'T CODE ANN. § 74.001(b)(4) (calling for annual meeting of presiding judges of administrative judicial regions to "promote more effective administration of justice through the use of this chapter"); *see also Roberts v. Ernst*, 668 S.W.2d 843, 846 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding) (refusing to agree that initial exchange of benches between judges was done pursuant to Texas Constitution Article V, section 11 where judge's authority had ceased under terms of assignment order).

***8** The relator bears the burden of showing entitlement to mandamus relief. *See Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). There is nothing in the mandamus record showing that Judge Gallagher, whose appointment ended January 2, 2017 and Judge Thompson, who was sworn in as the judge of the 416th District Court of Collin County on that same day, agreed to exchange benches pursuant to Texas Constitution Article V, section 11. We therefore conclude that the State has failed to meet its burden of showing that Judge Gallagher continued to have authority to sit in the underlying cases past the expiration of the assignment orders. *See Roberts*, 668 S.W.2d at 846. As a result, we hold that the State has not shown that it is entitled to mandamus relief. [13]

Conclusion

We deny the petition for writ of mandamus. *See* TEX. R. APP. P. 52.8(a). We lift the stay imposed by our July 7, 2020 and October 29, 2020 orders. All pending motions are dismissed as moot.

Goodman, J., concurring and dissenting.

CONCURRING AND DISSENTING OPINION

Gordon Goodman, Justice

The State petitions for mandamus relief arguing that the trial court abused its discretion in vacating an order that transferred these cases from Collin County to Harris County. The majority disagrees and denies the State's petition on the ground that the transfer order is void. Among other things, the majority holds that:

(1) the district judge who transferred these cases from Collin County to Harris County lacked the authority to do so because he presided over these cases under a statutory assignment and this statutory assignment had expired before he entered the transfer order; and

(2) Article V, Section 11 of the Texas Constitution, which allows a district judge to hold court for another when they deem it expedient, did not allow the district judge to continue presiding after his statutory assignment expired

because this interpretation would thwart the statutory scheme.

With respect to the first prong of the majority's holding, I concur because the majority reaches the right result but does so for the wrong reasons. As to the second prong of the majority's holding, I respectfully dissent from it altogether.

Background

At the heart of this petition lies a dispute between the State and Ken Paxton about where the underlying criminal cases should be tried. The State prefers that they be tried in Harris County. Paxton prefers that they be tried in Collin County.

The procedural posture of this petition is straightforward. At the request of the presiding judge of the First Administrative Judicial Region, in which Collin County is located, the presiding judge of the Eighth Administrative Judicial Region, in which Tarrant County is located, assigned Tarrant County District Judge George Gallagher to preside over these cases in the 416th District Court of Collin County. But the presiding judges of these two administrative regions entered conflicting orders as to the duration of the assignment. The presiding judge of the Eighth Region assigned Gallagher for a set number of days, unless the cases went to trial during this period, in which case Gallagher was to shepherd them to final judgments, subject to termination of the assignment at an earlier date by the presiding judge for the Eighth Region. In contrast, the presiding judge of the First Region assigned Gallagher to preside over these cases indefinitely, unless this presiding judge of the First Region terminated the assignment at an earlier date.

***9** The State eventually requested that Gallagher transfer these cases to Harris County, and Gallagher did so. *See* TEX. CODE CRIM. PROC. art. 31.02 (authorizing transfer on prosecution's motion when fair and impartial trial cannot be had in county in which case is pending). It is undisputed that Gallagher's assignment had expired under the terms of the order entered by the presiding judge of the Eighth Region when Gallagher transferred these cases to Harris County.

Paxton objected to Gallagher's transfer order, but Gallagher did not rule on the objection. Instead, Gallagher ordered that Paxton's objection be heard by the Harris County district court to which the cases would be transferred.

The Harris County district court sustained Paxton's objection. It vacated Gallagher's transfer order, returning the cases to Collin County, on the basis that Gallagher's assignment had expired before he transferred the cases. In its mandamus petition, the State contests the order vacating the transfer order.

Analysis

First Prong of the Majority's Holding

The majority first holds that the more definite assignment order of the presiding judge of the Eighth Region trumps the broader one entered by the presiding judge of the First Region. The majority reasons that construing Section 74.056(b) of the Government Code "as allowing the receiving judicial administrative presiding judge to unilaterally dictate the terms of an assignment would thwart regional oversight and conflict with the purpose of regional administrative management." The majority further reasons that the more definite order prevails over the broader one under well-established canons of interpretation.

While the majority reaches the right result, it does so for the wrong reasons. Section 74.056(b) provides that a "presiding judge of one administrative region may request the presiding judge of another administrative region to furnish judges to aid in the disposition of litigation pending in a county in the administrative region of the presiding judge who makes the request." The statute expressly provides that one administrative judge may request that another administrative judge furnish judges. In this context, a request is the act of formally asking for something, and furnish means to supply, give, or provide. NEW OXFORD AMERICAN DICTIONARY 705, 1483 (3d ed. 2010). If the presiding judge of one administrative region could simply commandeer judges from another administrative region, that presiding judge would not need to formally ask the presiding judge of the other administrative region for this aid and the presiding judge of the other administrative region would not need to supply, give, or provide this aid. In other words, the result that the majority intuits from the statutory scheme's purpose inheres in the plain language of the statute.

When, as here, a statute's language is clear and unambiguous, our analysis ends because the Legislature must be understood to mean what it expressed. *Day v. State*, 614 S.W.3d 121, 127 (Tex. Crim. App. 2020). Under these circumstances,

we discern the Legislature's intent, and thus the statute's purpose, from the plain meaning of the statutory text alone, not inferences drawn from the statutory scheme. *Id.*; *State v. Doyal*, 589 S.W.3d 136, 149 (Tex. Crim. App. 2019).

And if Section 74.056(b) left any doubt as to who has the authority to assign judges to another administrative region, another provision in this statutory framework would eliminate that doubt altogether. Section 74.058(a) of the Government Code provides that "a judge assigned by the presiding judge to a court in the same administrative region, or to a court in another administrative region at the request of the presiding judge of the other administrative region, shall serve in the court or administrative region to which he is assigned." The plain language of Section 74.058(a) expressly identifies the presiding administrative judge of the region in which the assigned judge ordinarily sits as the assigner.

***10** The majority strays further afield in resorting to canons of interpretation. The general-versus-specific canon is well established. *E.g.*, *Sims v. State*, 569 S.W.3d 634, 642 (Tex. Crim. App. 2019) (applying canon to statutes). But courts ordinarily apply this canon to resolve irreconcilable conflicts between statutory or contractual provisions. It is not self-evident that the canon can be applied to inconsistent orders entered by different judges. Nor is it apparent that the inconsistency at issue—the duration of Gallagher's assignment—is one susceptible to characterization as a conflict between a general provision and a specific one. In its proper application, courts apply the general-versus-specific canon so that a specific provision operates as an exception to the general one in a particular situation, not to negate the general provision entirely. *Id.* The majority's application of the canon, however, interprets one of the two orders, the one it characterizes as general, out of existence.

At any rate, assuming inconsistent orders entered by different judges can be reconciled by resort to canons of interpretation in general, the majority's attempt to do so in this particular instance is fatally flawed because its reconciliation rests on an erroneous interpretation of the statute under which the inconsistent orders were entered. The majority erroneously posits that the presiding judge of the First Region could have assigned Gallagher, notwithstanding the unambiguous contrary language of Sections 74.056(b) and 74.058(a). But given that one of the assignment orders is valid and the other is not, there is no need to reconcile the two orders.

In sum, the majority is correct that the narrower assignment order of the presiding judge of the Eighth Region prevails over the broader one entered by the presiding judge of the First Region. But this is so because the presiding judge of the First Region did not have any authority to assign Gallagher to sit in Collin County and hear these cases under the plain language of the applicable statutes, not because of the ostensible overarching purpose of the statutory scheme or because of the ostensible need to reconcile the two orders through canons of interpretation.

Second Prong of the Majority's Holding

Apart from the statutory assignment of judges to other districts and counties, our Constitution provides that "District Judges may exchange districts, or hold courts for each other when they may deem it expedient." TEX. CONST. art V, § 11. Under this constitutional provision, district judges have broad discretion to exchange benches or hold courts. *Floyd v. State*, 488 S.W.2d 830, 832 (Tex. Crim. App. 1972). They may exchange benches or hold courts for each other without "a formal order or entry on the record of the reasons." *Id.* There are no geographical restrictions on this provision. *Sanchez v. State*, 365 S.W.3d 681, 685 (Tex. Crim. App. 2012).

The majority holds that Article V, Section 11 does not apply for two reasons. First, it says the record shows that Gallagher was statutorily assigned to these cases, not that he exchanged benches with another judge under the constitutional provision, and that his statutory assignment had expired. Second, the majority says an expired statutory assignment cannot be "automatically converted" into a constitutional exchange of benches because doing so "would create confusion about the scope of assignment orders and undermine the effectiveness of the Court Administration Act."

I do not dispute that Gallagher was statutorily assigned to preside over these cases or that his statutory assignment had expired when he transferred them to Harris County. But Article V, Section 11's standard—expediency—is very broad. Under this provision, an exchange of benches is expedient whenever it is "convenient and practical." NEW OXFORD AMERICAN DICTIONARY 609 (3d ed. 2010). One of our sister courts has held that an assignment order reflected that the judges involved had deemed it expedient for the assigned judge to preside over a case as contemplated by Article V, Section 11, notwithstanding the fact that the

order referenced neither the constitutional provision nor its expediency standard. *Permian Corp. v. Pickett*, 620 S.W.2d 878, 880–81 (Tex. App.—El Paso 1981, writ ref'd n.r.e.). Similarly, the assignment order before us—though expired—effectively reflects that the judges involved deemed it expedient for Gallagher to preside over these cases. This is enough to save Gallagher's transfer order, particularly given that Paxton did not object to Gallagher's continued involvement in the cases until after the order had been entered and more than five months after Gallagher's statutory assignment had expired. [1]

***11** I acknowledge that applying Article V, Section 11 under circumstances like these could result in confusion about the scope of an assignment order in a given case. But we can achieve certainty only at the expense of flexibility. Some potential for confusion is unavoidable in a flexible system like ours, which includes multiple sources of authority for the assignment of judges and exchange of benches under a variety of circumstances. *See* TEX. CONST. art. V, § 11; TEX. GOV'T CODE §§ 24.003, 74.056–.057, 74.121; TEX. R. CIV. P. 330(e). Those who ratified the broad language of Article V, Section 11 necessarily weighed the trade-off between certainty and flexibility and struck the balance in favor of the latter by placing no limitations other than expediency on the provision. Our safeguard against any resulting potential for confusion lies in restraint, collegiality, communication, and cooperation on the part of judges. *Davis v. Crist Indus.*, 98 S.W.3d 338, 343 n.19 (Tex. App.—Fort Worth 2003, pet. denied). In this case, the application of Article V, Section 11 could not cause any more confusion than has already resulted from the entry of conflicting assignment orders by the presiding judges of two administrative regions.

The majority cites our decision in *Roberts v. Ernst* as support for its position that we cannot treat Gallagher's assignment as a constitutional exchange of benches. 668 S.W.2d 843 (Tex. App.—Houston [1st Dist.] 1984, orig. proceeding). But *Roberts* was decided on very different facts. In that case, the presiding judge of the administrative region assigned a district judge to another court for one week as well as the period of time afterward necessary to complete any trial begun and to hear any new-trial motions. *Id.* at 844. The assigned district judge tried a case during this period but granted the plaintiffs a new trial afterward on the ground that the damages awarded by the jury were inadequate. *Id.* Months later, as the case approached retrial, the presiding judge of the administrative region assigned a second district judge to the court to address pretrial motions. *Id.* at 844–45. This second judge heard these motions and granted a continuance sought by the defendants. *Id.* at 845. The district judge who originally tried the case apparently was in the courtroom when the second judge did so and disapproved of the second judge's ruling. *See id.* Almost within the hour, the original judge—whose assignment to the court had long ago expired—vacated the continuance entered by the second judge and then granted the plaintiffs a change of venue! *Id.* In a later mandamus proceeding, the plaintiffs tried to defend this turn of events on the ground that the first district judge continued to properly exercise authority over the case under Article V, Section 11. *Id.* at 846. On these remarkable facts, which involved one district judge whose assignment had expired undoing the order of another judge who had since been assigned to the case, we quite sensibly rejected the plaintiffs' argument on the ground that the record contained no evidence that the two judges had agreed to an exchange of benches. *Id.*

In other words, *Roberts* stands for the commonsense principle that an exchange of benches cannot exist, or be implied from an expired assignment, when the facts definitively show that one judge is interfering with the rightful authority of another. This principle has no applicability here, given that Gallagher was the lone judge presiding over these cases when he transferred them to Harris County.

Though the order assigning Gallagher to hear these cases had expired, it implicitly reflects a judgment by the assigning presiding judge that Gallagher's presence is expedient. *See Permian Corp.*, 620 S.W.2d at 880–81. Likewise, the second assignment order, though invalid, implicitly reflects a judgment on the part of the requesting presiding judge that Judge Gallagher's presence is expedient. *See id.* When, as here, a district judge continues to hear assigned cases after the expiration of his assignment without protest from the assigning or receiving presiding judges, and his continued hearing of the cases does not bring him into conflict with the judge who ordinarily presides over the court, Article V, Section 11 fills the gap, enabling the district judge to carry on with the lapsed assignment until circumstances arise that show his presence is no longer welcome. Thus, Gallagher's order transferring these cases from Collin County to Harris

County is not void, and the Harris County district court erred in vacating the transfer order on this basis.

***12** As for the majority's contention that applying Article V, Section 11 in this instance would undermine the Court Administration Act, the majority puts the cart before the horse. Our Constitution is supreme. If its provisions undermine a statute, it is the statute that must give way. Courts have repeatedly said so with respect to Article V, Section 11 in particular. *See Moore v. Davis*, 32 S.W.2d 181, 182 (Tex. Comm'n App. 1930) (provision cannot be abridged by statute); *Reynolds v. City of Alice*, 150 S.W.2d 455, 458–60 (Tex. App.—El Paso 1940, no writ) (provision's scope cannot be limited by statute); *Ferguson v. Chapman*, 94 S.W.2d 593, 599 (Tex. App.—Eastland 1936, writ dism'd) (provision cannot be abridged by statute); *Connellee v. Blanton*, 163 S.W. 404, 406 (Tex. App.—Fort Worth 1913, writ ref'd) (provision could not be interpreted as having been contravened by statute). But given that neither the presiding administrative judges nor the district judge who ordinarily presides over the Collin County court objected to Judge Gallagher continuing to hear these cases, any ostensible conflict with the Court Administration Act is chimerical.

For these reasons, I think the majority's refusal to apply Article V, Section 11 is flawed. Gallagher's continued involvement in these cases after the expiration of his assignment was expedient and therefore authorized by our Constitution.

Conclusion

I would grant the State's petition for the writ of mandamus because Article V, Section 11 of the Texas Constitution authorized Judge Gallagher to transfer these cases to Harris County after his statutory assignment expired. Thus, I respectfully dissent from the majority's denial of the State's petition for the writ of mandamus. That said, at this point almost six years has elapsed since Paxton was indicted. Whichever district court ultimately receives these cases should move them to trial as expeditiously as possible. Further delay is anything but expedient.

All Citations

--- S.W.3d ----, 2021 WL 2149332

Footnotes

1 The underlying cases are *The State of Texas v. Warren Kenneth Paxton, Jr.*, Cause Nos. 1555100, 1555101, and 1555102, in the 185th District Court of Harris County, Texas, the Honorable Jason Luong presiding.

2 *See In re Blevins*, 480 S.W.3d 542, 543–44 (Tex. 2013).

3 *See* TEX. GOV'T CODE ANN. § 24.560 ("The 416th Judicial District is composed of Collin County."); *id.* § 74.042(b) (including Collin County in First Administrative Judicial Region).

4 *See id.* § 24.541(a) ("The 396th Judicial District is composed of Tarrant County."); *id.* § 74.042(i) (including Tarrant County in Eighth Administrative Judicial Region).

5 2016 was a leap year. The email correspondence between the Presiding Judges' staff in the mandamus record cites December 31, 2016 as the end date for the appointment. Calculating the end date according to the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure, it is January 2, 2017. *See* TEX. R. CIV. P. 4; TEX. R. APP. P. 4.1.

6 In the mandamus petition, Relator asserts that Judge Johnson "failed to discharge his ministerial duty to rule on Relator's motion to issue a new payment order for payment of attorney's fees and on Nicole DeBorde's unopposed motion to withdraw as an attorney pro tem within a reasonable time."

7 *See In re Blevins*, 480 S.W.3d at 543–44.

8 Respondent's alternative conclusion that the trial court lacked jurisdiction to reconsider Judge Johnson's June 25, 2020 order because its plenary power had expired ignores our July 7, 2020 order staying enforcement of the June 25, 2020 order. Our emergency-stay order, which was issued before the expiration of the trial court's thirty-day period of plenary power, preserved the status quo and remains "effective until the case is

finally decided." TEX. R. APP. P. 52.10(b). As a result, we decide the issue of whether Respondent erred in vacating Judge Gallagher's change of venue order and returning the underlying cases to Collin County.

9 *See* TEX. CONST. art. V, § 11 ("[T]he District Judges may exchange districts, or hold courts for each other when they may deem it expedient, and shall do so when required by law."); TEX. GOV'T CODE ANN. § 74.121(a) ("The judges of those courts within a county may exchange benches and courtrooms with each other so that if one is absent, disabled, or disqualified, the other may hold court for him without the necessity of transferring the case.").

10 Apart from the expiration of Judge Gallagher's assignment, Paxton has not asserted that Judge Gallagher was unqualified in any way.

11 The chief justice of the Supreme Court of Texas also has the authority to assign judges of "one or more administrative regions for service in other judicial administrative regions" when the chief justice "considers the assignment necessary to the prompt and efficient administration of justice." TEX. GOV'T CODE ANN. § 74.057(a). An assignment by the chief justice under that provision requires the assigned judge to perform the same duties and functions that the judge would perform if assigned by the presiding judge. *Id.* § 74.057(b).

12 The Texas Government Code codifies this provision in two places. *See* TEX. GOV'T CODE ANN. § 24.003(b)(4) (district judge may "temporarily exchange benches with the judge of another district court in the county"); *id.* § 74.121 (declaring "[t]he judges of those courts within a county may exchange benches and courtrooms with each other so that if one is absent, disabled, or disqualified, the other may hold court for him without the necessity of transferring the case"). These provisions, which by their terms, are limited to intra-county exchange of benches, do not affect our disposition of the petition for writ of mandamus.

13 Because of our disposition of the State's first issue, we do not reach its second and third issues requesting that we compel the trial court to rule on certain motions. *See* TEX. R. APP. P. 47.1.

1 At the December 17, 2019 hearing on Paxton's motion to set aside Gallagher's transfer order, Paxton's counsel represented that he objected to the transfer order as soon as he discovered that Gallagher's assignment had expired. But counsel's representation was not based on personal knowledge. After counsel for the State argued that there was no evidence as to when Paxton's counsel discovered that Gallagher's assignment had expired, Paxton's counsel explained: "I'm telling you as an officer of the court standing here in good faith we found out in May. If you want to take testimony on that, I'm happy to have Phil, who I think actually discovered this, testify." Because Paxton's counsel did not have firsthand knowledge of the matter (and Phil did not testify), the trial court could not rely on his representations as evidence. *Gonzales v. State*, 435 S.W.3d 801, 811–12 (Tex. Crim. App. 2014). Nor can we. There is no evidence in the record as to how or when Paxton's counsel discovered that Gallagher's assignment had expired.

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